

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 McLAUGHLIN,

5 Plaintiff,

6 versus

CV 04-1945

7 PHILLIP MORRIS, ET AL.,
8 Defendant.

United States Courthouse
Brooklyn, New York

9 -----x
10 September 12, 2005
11 10:00 a.m.

12 TRANSCRIPT OF HEARING

13 Before: HON. JACK B. WEINSTEIN, District Judge

14 APPEARANCES

15 Attorneys for Plaintiff:

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1 THE COURT: Yes, everybody, I think, agrees with
2 that, including the defendants.
3 Were they buying because they thought lights meant
4 something other than less tar which was right on packages?
5 MR. HAUSFELD: And that gets us to certain analogies
6 by courts of the fraud aspects of a RICO violation.
7 THE COURT: They were required to put the amount of
8 tar right on the cigarette, right?
9 MR. HAUSFELD: No.
10 There is no package of lights that contain the FTC
11 numbers on the face of the package. What is on the face of
12 the package is lights.
13 THE COURT: What is on the face of the package is
14 the warning that these things have a habit but didn't all
15 their advertisements show the amount of tar?
16 MR. HAUSFELD: I think so. I think the
17 advertisements did but not the package.
18 We're focusing on the packages, your Honor, because
19 one of the elements that Courts looked at with respect to a
20 RICO fraud violation is: Was the allegation of fraud written
21 or oral? Was it uniform or variable?
22 That is all answered by the fact that we are
23 focusing on the descriptor lights on each and every package.
24 The courts in the Paine Webber case, for example,
25 the Second Circuit said: How do we know even though there may

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1 have been a uniform written presentation that everyone
2 received that uniform written presentation?
3 Every package of lights had the word lights. You
4 could not get a package --
5 THE COURT: And none of them had the amount of tar?
6 MR. HAUSFELD: I don't believe so. Not the package
7 itself.
8 THE COURT: Okay.
9 MR. HAUSFELD: You did not get a package of lights
10 with that descriptor unless you asked for that package of
11 lights by name.
12 So part of the questions that have troubled the
13 circuits and the district courts, that is the variability in
14 the material representation, the uniformity of the
15 representation and the receipt of the representation are all
16 absent here.
17 THE COURT: Do you have expert or other evidence
18 that lights meant less harmful to the user?
19 MR. HAUSFELD: Yes, every one of them including the
20 public health community including the defendants' own
21 documents and the defendants' own officers.
22 THE COURT: But the word lights independent of the
23 amount of tar meant less harmful?
24 MR. HAUSFELD: Yes.
25 THE COURT: And your experts say that?

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1 MR. HAUSFELD: As to their documents and their
2 witnesses, yes.
3 So this boils down now to an industry understanding
4 that its very viability was in jeopardy, knowing that there
5 was a product which they were marketing called lights could
6 shift that market from regular to the light brand of cigarette
7 on the consumers's belief that lights were less harmful and
8 the market did shift and the documents that are in defendants'
9 own files unequivocally demonstrate that the lights market was
10 a health concerned market. It was created not to pull the
11 market or respond to consumer demand but to push the market,
12 say here is a light, safer cigarette.
13 THE COURT: Excuse me. Your PX 1 on the board there
14 says what lights meant to the consumer was less tar. Then you
15 had to go through the syllogism, less tar equals less harmful
16 therefore lights equal less harmful.
17 And the question I posed earlier to your learned
18 opponents and am posing to you is: Did the consumer go
19 through the less tar step because the tar amounts were decided
20 by the FTC, right?
21 MR. HAUSFELD: The precise amounts of tar delivery
22 to a machine were measured by the FTC but it was in the
23 defendants' own words common knowledge that less of something
24 harmful was safer.
25 THE COURT: Are you in a sense saying that the

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1 consumer didn't go through the less tar analysis directly to
2 the conclusion at the instigation of the defendants that
3 lights meant less harmful?
4 MR. HAUSFELD: Yes, less tar was synonymous with
5 less harmful. So when they saw lights, lights was essentially
6 the -- was synonymous without going through the middle step
7 less harmful. Lights had less tar, less tar meant less
8 harmful, regardless of the specific numbers.
9 THE COURT: All right, I think you are giving up
10 something there but that's what you say, that is fine.
11 MR. HAUSFELD: What I am saying, without giving up
12 anything, your Honor, is there did not have to be a segregated
13 three-step approach.
14 THE COURT: If a kid wanted to go out and smoke and
15 he saw lights or she saw lights, did that kid go through the
16 lights equal less tar, less tar equals less harm, lights equal
17 less harm or did they just say lights means less medical
18 problems?
19 MR. HAUSFELD: Probably at the time that lights were
20 first introduced, there was more of a lights was less tar,
21 less tar was less harmful.
22 THE COURT: That is back in 1970.
23 MR. HAUSFELD: And over time the less tar less
24 harmful became subsumed automatically in the descriptor
25 lights.